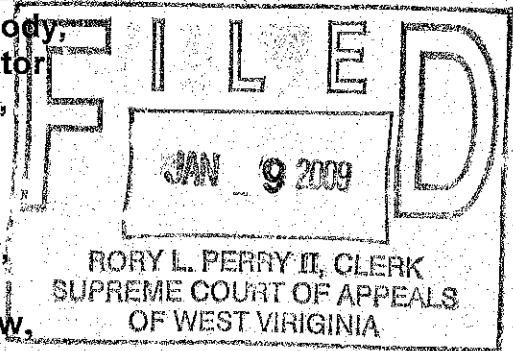


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 34583

COPY

JEFFERSON COUNTY ZONING
BOARD OF APPEALS, A public body,
PAUL RACO, Zoning Administrator
THOMAS TRUMBLE, Member,
EDWIN T. KELLY, II, Member
TIFFANY HINE, Chair,
CHRISTY HUDDLE, Member,
FRANCES MORGAN, Member,

Appellants / Respondents Below,



v.

JEFFERSON COUNTY CITIZENS FOR ECONOMIC PRESERVATION

Appellee / Petitioner Below.

RESPONSE BRIEF ON APPEAL

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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Jefferson County Citizens for Economic Preservation, (herein "JCCEP"), is a non profit corporation located in Jefferson County, West Virginia. JCCEP filed a declaratory judgment action¹ before the Jefferson County Circuit Court challenging the procedure that the County Commission utilized to amend² its Zoning Ordinance.³

The essence of this case is that neither the Planning Commission nor the County Commission followed the mandatory procedural steps in §12.2 of their own Ordinance when amending the Ordinance, and as a result, the Circuit Court declared the amendments invalid.

Section 12.2 of the Ordinance in effect at the time of the April 8, 2005 amendments required the Commission to follow the same procedural steps that were described in W.Va. Code §8-24-18 *et seq.*⁴ when enacting an Ordinance amendment.⁵

Since the §12.2 Ordinance procedure was not followed, the county enacted the amendments in error.

On February 21, 2007, the Circuit Court ruled that the Commission, as a matter of law, should have followed the procedures outlined in Section 12.2 of the pre-April, 2005 Ordinance to validly amend the Ordinance. On February 26, 2008, the Circuit Court entered an Order

¹ JCCEP also filed a Petition for Writ of Certiorari which was denied by the Circuit Court.

² The April 8, 2005 Ordinance Amendments are called the "Ordinance Amendments" herein.

³ The Jefferson County Zoning Ordinance is referred to herein as the "Ordinance."

⁴ The former land use statute, W. Va. Code §8-24-1, *et seq.* was last amended in 1986 and continued until it was superceded by W. Va. Code 8A.

⁵ In 2004, the West Virginia legislature replaced Chapter 8 of the land use laws and adopted W.Va. Code 8A which became effective June 13, 2004. Under W. Va. Code § 8A-7-12, a zoning ordinance that is already enacted under the former Chapter 8 is validated and continues in effect until the existing Ordinance is amended.

Jefferson County amended its Zoning Ordinance for the first time, effective April 8, 2005. The Ordinance language that was in effect at the time of the April 8, 2005 amendments required the County to follow the procedural rules set forth in §12.2 of the Ordinance when amending the Ordinance.

invalidating the April 8, 2005 amendments, finding that the Planning Commission did not follow W. Va. Code § 8-24-18 - §8-24-20 as recorded by Ordinance §12.2.

The Circuit Court was correct in both of its rulings in this case.

In the County Commission's Brief on Appeal ("Brief"), the County Commission erroneously believes that it did not have to follow §12.2 of the Ordinance when amending the Ordinance, and, even if it did, the county claims it "complied with W.Va. Code § 8-24-1, *et seq.* in amending the Ordinance"⁶

The County Commission misses the point of the Circuit Court's Order.

Under W.Va. Code § 8-24-18, *et seq.*, the Planning Commission, not the County Commission, was the public body that was required to hold hearings⁷ on the zoning amendments, and certify them to the County Commission for approval.⁸

From the record, it is apparent that the Planning Commission did not hold the hearings on

⁶ See Brief on Appeal, Pg. 7 and 9.

⁷ To remove any confusion as to whether the word "commission" when used alone in W.Va. Code § 8-24-1 *et seq.* refers to the Planning Commission, W.Va. Code § 8-24-3 defines "commission or planning commission" as "a municipal planning commission or a county planning commission." See W.Va. Code § 8-24-4 Definitions (a) "Commission or planning commission" shall mean a municipal planning commission or a county planning commission, as the case may be; . . .

⁸ Because the County Commission drafted the Ordinance amendments, rather than the Planning Commission as stipulated in W.Va. Code § 8-24-1 *et seq.*, the County Commission erroneously alleges in its Brief on Appeal that it complied with the requirements of §12.2 of the Ordinance. Contrary to the County Commission's position, it was the responsibility of the Planning Commission, not the County Commission, for drafting amendments to the Ordinance for adoption, since W.Va. Code § 8-24-16 states in part:

"A planning commission shall make and recommend for adoption to the governing body of the municipality or to the county court [county commission], as the case may be, a comprehensive plan for the physical development of the territory within its jurisdiction."

Since the former Ordinance requires the following those same procedural steps as utilized in drafting the Comprehensive Plan, it follows that the Planning Commission should have drafted the Ordinance amendments as well, even though the actual requirement for the Planning Commission to engage in the drafting is stated in W.Va. Code § 8-24-16. Consequently, the Planning Commission should have drafted the zoning amendments as well as held hearings on the Ordinance, since the thrust of the code sections involved (which directs the adoption of the comprehensive plan) states that the planning commission is responsible for drafting the Comprehensive Plan.

the zoning amendments that were required by §8-24-18, *et seq.* Instead, the County Commission drafted the amendments and purportedly sent them to the Planning Commission to determine if the amendments followed the Comprehensive Plan. This is a purported attempt to follow the W. Va. Code Chapter 8A procedure, while wholly ignoring the Ordinance §12.2 requirement that the Commission follow the same steps outlined in W.Va. Code §8-24-18 *et seq* when amending the Ordinance.

So it is in fact a question of the “source” of the activity regarding the amendments. Based on §12.2 of the Ordinance, and the Circuit Court’s February 21, 2007 ruling, the Planning Commission should have been the source of the notices and hearings regarding the 2005 ordinance amendments. But it was not. The Planning Commission should have then certified the amendments to the County Commission. But it did not. The Planning Commission should have adopted the amendments by resolution, but it did not.

Even under the alternative provision in the former W. Va. Code § 8-24-23 , the County Commission, at best, could have requested that the Planning Commission prepare the amendments. Yet neither the County nor Planning Commission followed this alternate procedure.

So it becomes a question as to whether the law means what it very clearly says.

The Circuit Court conducted a thorough factual analysis as to what the Planning Commission and County Commission did with regard to the amendments, and concluded that Ordinance §12.2 was not followed, and that both the Planning Commission and County Commission are bound to follow both the law and their own ordinance.⁹ The Jefferson County Circuit Court determined in this case that the laws requiring the Planning Commission to develop and pass the zoning amendments and send those amendments to the County Commission meant

⁹ See Order at pp. 12-16.

exactly what it said. Since the Planning Commission failed to follow the law in amending the zoning ordinance, and the County Commission aided and abetted the Planning Commission in this failure, and failed to follow the law in its own right, the Circuit Court struck the April 8, 2005 Ordinance Amendments as wholly invalid and void *ab initio*. This Court should uphold the Circuit Court's decision.¹⁰

II. STATEMENT OF FACTS

1. The County Commission of Jefferson County, West Virginia (herein "County Commission") adopted amendments to the Jefferson County Zoning Ordinance on March 23, 2005.

2. The Ordinance amendments purportedly became effective on April 8, 2005.

3. JCCEP filed a declaratory judgment action challenging the amendments to the Ordinance, including the fact that the Commission failed to follow the procedures contained in §12.2 of its pre-April, 2005 Ordinance when it adopted the April, 2005 Ordinance amendments.

4. The County Commission filed a Motion for Summary Judgment as to a variety of issues, one of which encompassed the issue as to whether the April, 2005 amendments were validly adopted.

5. JCCEP filed a Motion for Partial Summary Judgment on July 12, 2007.

6. The Jefferson County Circuit Court, on February 21, 2007, ruled that the County Commission was required, as a matter of law, to follow the procedures contained in Section 12.2

¹⁰ This Court should note that the Ordinance from which this appeal arises and the April 8, 2005 amendments have since been superseded by a new ordinance that was passed on October 2, 2008 with an effective date of November 1, 2008. The new ordinance has been challenged in the Jefferson County Circuit Court on procedural and substantive grounds.

Whether the adoption of the new ordinance (which could be struck as invalid for many of the same reasons as the April 8, 2005 amendments) moots this appeal is a matter for this Court to determine. Appellees raise the suggestion for the Court's consideration.

when it adopted the April, 2005 Ordinance amendments. (See February 21, 2007 Circuit Court Order attached as *Exhibit "A"* to JCCEP's Motion for Partial Summary Judgment Regarding Validity of Ordinance Amendments). The Circuit Court stated in part that:

It is very clear that the new zoning statutes validated all ordinances adopted under the old zoning statutes. Therefore, Section 12.2, as stated above, was in effect at the time the Commission amended the Ordinance. Section 12.2 requires the Commission to follow the procedure outlined in 8-24-18 through 8-24-23 in order to validly amend the Ordinance. These sections require hearings and certification among other things.

Id.

7. The County Commission's failure to follow Section 12.2 when adopting the Amendments is evidenced by the March 23, 2005 minutes of the meeting of the County Commission. (See minutes of Jefferson County Commission meetings from January 6, 2005 through March 23, 2005 attached as *Exhibit "B"* to JCCEP's Motion for Partial Summary Judgment, and minutes of Jefferson County Planning & Zoning Commission meetings from January 11, 2005 through March 22, 2005 attached to JCCEP's Motion for Partial Summary Judgment as *Exhibit "C"*).

8. The Affidavit of Fred Blackmer, Executive Director of JCCEP, attached to JCCEP's Motion for Partial Summary Judgment as *Exhibit "D,"* also evidences the Commission's failure to meet the statutory requirements in adopting the April, 2005 Ordinance amendments.

9. The Ordinance amendments included new procedures for amending the Ordinance that replaced the pre-April 2005 procedures that were contained in Section 12.2.

10. The Ordinance amendments also included the County Commission's decision to amend Ordinance provision 5.7(d)(1) to state that, in a rural district, a landowner could only

subdivide¹¹ lots into parcels no smaller than one home in fifteen acres, (instead of the 1 in 10 acre provision that was previously the rule), which substantially reduces landowner's property values.¹²

11. The Circuit Court, upon consolidation of all motions filed, entered an Order invalidating the April 8, 2005 amendments on February 26, 2008.

12. The basis of the Circuit Court's Order was that the Planning Commission and County Commission did not follow the statutory procedure in amending the Ordinance. The Court said:

"It is clear to the Court that [the Commission] did not follow most if not all of the legislative requirements in the Enabling Act for the amendment of zoning ordinances."

February 26, 2008 Order at p. 16.

III. POINTS AND AUTHORITIES

A. The Circuit Court Properly Ruled that the Commission Did Not Follow the Procedural Steps That Were Required by Section 12.2 of its Own Ordinance for an Ordinance Amendment

Under the Ordinance as it existed prior to the April 8 2005 amendments, §12.2 of the Jefferson County Zoning Ordinance required the Commission follow the procedural steps outlined in W.Va. Code Chapter 8 in order to amend the Ordinance. Section 12.2 directly

¹¹ That is, unless the landowner creates a development by utilizing the Development Review System, which involves tremendous expense that would have been unnecessary prior to the amendment.

¹² The most egregious aspect of this "1 in 15 acre" amendment is that, when the Commission held hearings regarding the amendments to the Ordinance, it did not accurately represent its true position at the hearings. The Commission represented in its public meetings that it would retain the 1 in 10 acre provision, but then changed its position and amended the Ordinance at the last minute to create the 1 in 15 acre provision, contrary to its prior representations, thereby depriving Jefferson County landowners of substantial property value without allowing them adequate time to comment or even know about the change, which was contrary to the representations made to the public.

incorporated these procedural steps by reference into the Ordinance itself. This is the relevant text of Ordinance Section 12.2 at the time the Ordinance amendments were considered and adopted:

Section 12.2 Procedure for Amendment

- (1) After the adoption of this ordinance, all amendments to it shall be adopted according to the procedures set forth in sections eighteen through twenty-three of Chapter 8, Article 24 of the West Virginia Code, as amended; except, that public publication of notice of the date, time and place of hearing upon amendment of the zoning ordinance need be only fifteen or more days prior to the date set for such hearing; and except that if the County Commission desires an amendment, it may direct the Planning Zoning Commission to prepare an amendment and submit it to the public hearing within sixty (60) days after formal written request by the County Commission.

The Procedures in §12.2 of the Ordinance were effective at the time the Ordinance amendments were passed, because, under W.Va. Code § 8A-7-12, a zoning ordinance has effect *unless and until the Ordinance is amended* by a new ordinance adopted after 8A was passed.

All zoning ordinances, all amendments, supplements and changes to the ordinance, legally adopted under prior acts, and all action taken under the authority of the ordinance, are hereby validated and *the ordinance shall continue in effect until amended* or repealed by action of the governing body taken under authority of this article.

W.Va. Code, § 8A-7-12 (emphasis added)

The Code also states:

(b) All zoning ordinances, and all amendments, supplements and changes thereto, legally adopted under any prior enabling acts, and all actions taken under the authority of any such ordinances, are hereby validated and continued in effect *until amended* or repealed by action of the governing body of the municipality or the county taken under authority of this article. These ordinances shall have the same effect as though previously adopted as a comprehensive plan of land use or parts thereof.

W.Va. Code, § 8A-7-10 (emphasis added)

As the Commission points out in its brief, the Ordinance amendments became effective on April 8, 2005.¹³ This includes both the new procedures for amending the Ordinance and the 1 lot in 15 acre lot size provision.

At the time, the amendments to the Ordinance were passed (March 23, 2005) and were made effective, (April 8, 2005), no amendment had been made to the Ordinance under W.Va. Code Chapter 8A.

Consequently the amendment procedures under §12.2 of the former Ordinance had not been changed since the former Ordinance was in effect on April 8, 2005, and the amendment procedures under §12.2 of the former Ordinance applied.

The Commission was therefore required by its own Ordinance to follow¹⁴ the amendment procedures in Ordinance §12.2. The Commission did not follow the §12.2 procedures, which require that the Commission follow the steps outlined in West Virginia Code § 8-24-18 through §8-24-23.

W.Va. Code § 8-24-23 requires that specific procedures be followed to amend a land use ordinance, which the Commission did not follow in this case:

After the adoption of a comprehensive plan and ordinance, all amendments to it shall be adopted according to the procedures set forth in sections eighteen through twenty-two of this article, * * * (portions omitted, emphasis added)

The Ordinance therefore incorporates the W.Va. Code § 8-24-23 (1969) mandate that any amendment to an ordinance specifically comply with the then requirements of W.Va. Code § 8-24-18 through § 8-24-22. The amendment of the ordinance must be done according to

¹³ The amendments were adopted on March 23, 2005.

¹⁴ This failure to follow the proper procedures to amend the Ordinance is an application of an "erroneous principle of law" in violation of *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 71, 561 S.E.2d 793 (2002).

procedures set forth in the former statute.

The Circuit Court correctly ruled that “when a local government amends a zoning ordinance, it must be done within the limits of the zoning power delegated by the Enabling Act.” *February 26, 2008 Order* at p. 8.

B. The Circuit Court Properly Ruled that the Planning Commission Failed to Comply with W.Va. Code § 8-24-18

W.Va. Code § 8-24-18 requires that the Planning Commission, prior to the adoption of a comprehensive plan, shall give notice and hold a public hearing on the plan and the proposed ordinance.¹⁵

The Circuit Court found that the County Commission, not the Planning Commission, held the hearings and the Planning Commission only attended the hearings as a member of the general public. *February 26, 2008 Order* at p. 14.

The County Commission alleges in its Brief on Appeal that the two public hearings held regarding the amendments were orchestrated by the County Commission and the Planning Commission, and seems to believe that the statute was followed simply because some members of both bodies were at times present while the amendments were discussed. The Circuit Court rightly rejected this claim.¹⁶

The Notice that was published on February 3 and 10, 2005 does not support the County Commission’s allegation that the Planning Commission was instrumental in holding the two public hearings. The Notice reads:

¹⁵ W.Va. Code § 8-24-18 “Prior to the adoption of a comprehensive plan, a commission shall give notice, as hereafter in this section specified, and hold a public hearing on the plan and the proposed ordinance for its enforcement.” See FN 2 for definition of “commission.”

¹⁶ See Brief on Appeal, Pg 11.

NOTICE OF PUBLIC HEARING
JEFFERSON COUNTY COMMISSION PROPOSED
AMENDMENTS JEFFERSON COUNTY ZONING AND
DEVELOPMENT REVIEW ORDINANCE

Please take notice that the public hearings will be held on Wednesday February 23, 2005 and Thursday February 24, 2005, at 7:00 p.m. in the Jefferson County Meeting Room located on the Ground Floor of the Old Charles Town Library, 200 East Washington Street, Charles Town, West Virginia to receive public comment on proposed amendments to the Jefferson County Zoning and Development Review Ordinance.

Pursuant to 8A-7-8 of the State Code of West Virginia, the County Commission of Jefferson County, its staff and legal consultants have studied the aforementioned Ordinance and determined that amendments need to be made. The Commission will receive comments on Amendments to the Jefferson County Zoning and Development Review Ordinance, Draft of January 6, 2005, by the County Commission of Jefferson County.

All persons and governmental units having an interest in said proposed Ordinance amendments are invited to attend this meeting. County Commission files on the proposed amendments may be reviewed at any time during normal business hours at the Office of the Jefferson County Commission, 124 East Washington Street, of Charles Town, West Virginia. Copies of the proposed amendments may also be obtained at the Commission office or on the County website at www.jeffersoncountywv.org. If you have any questions, you may call the County Commission office at (304) 728-3264.

Any party desiring a transcript of these proceedings will be responsible for providing a competent stenographer at their own expense.

By Order of the County Commission of Jefferson County.

The published Notice does not support the County Commission's allegation¹⁷ that the Planning Commission was party to holding the two public hearings, nor does it support the concept that the Planning Commission was the source of the amendments, or that § 12.2 of the Ordinance was being followed as the guide for amendments. Instead, the Notice ignores §12.2

¹⁷ See Brief on Appeal, p. 11.

and references Chapter 8A.

The Notice states that County Commission, its staff and legal consultants studied the Ordinance and determined that amendments were necessary. There is no mention that the Planning Commission did the same.

The Notice states that the County Commission was to receive comments on the Amendments. No mention that comments were to be sent to the Planning Commission.

The Notice states that County Commission files may be reviewed by the public regarding the amendments. There is no offer in the Notice that the public could review the Planning Commission files.

The Notice states that copies of the proposed amendments may be obtained at the County Commission office. The Notice does not state that copies were attainable at the Planning Commission office.

Lastly, the Notice was published by Order of the County Commission, with no reference to the Planning Commission.

The County Commission voted in favor of taking the amendment proposals to public hearing on February 23 and 24, 2005.¹⁸

The Planning Commission, on the other hand, determined that public hearings on the proposed amendments were not necessary because such hearings were not mandated by the Comprehensive Plan, and the amendments were approved by the Prosecuting Attorney's Office.¹⁹

There is no evidence that members of the Planning Commission attended a public hearing

¹⁸ Jefferson County Commission Minutes, January 27, 2005, Pg 5

¹⁹ Although Planning Commissioner Rosella Kern stated she would like the proposed amendments to be discussed at a public hearing, Planning Commission President, Arnie Dailey, stated that he did not think the amendments needed to go to a public hearing because the Comprehensive Plan does not state that. Raco stated that the amendments were written and approved by the Prosecuting Attorney's Office. See Jefferson County Planning & Zoning Commission Minutes, March 22, 2005, #13, Pg 3

in their official capacity.

The County Commission alleges that because a “quorum of the Planning Commission was present” at each public hearing, the requirements of W.Va. Code § 8-24-18 are satisfied.²⁰

During the County Commission’s January 20, 2005 meeting the County Commission voted in favor of scheduling public hearings on February 15th and 16th , 2005 and to “invite the Planning Commission to attend the Public Hearings to participate and provide comment and changes.”²¹

A week later, on January 27, 2005, the County Commission rescinded the January 20, 2005 motion.²²

W.Va. Code § 8-24-18 mandates that the Planning Commission, not the County Commission, give notice and hold a public hearing. The County Commission’s invitation to the Planning Commission to attend the Public Hearings, which was later rescinded, does not fulfill the requirements of the statute as erroneously alleged by the County Commission.

Based on the foregoing, the County Commission and the Planning Commission have failed to comply with W.Va. Code § 8-24-18, therefore the Ordinance amendments are void.

C. The Circuit Court Properly Ruled that the Planning Commission Failed to Comply with W.Va. Code § 8-24-19

The County Commission also alleges that it complied with the requirements of W.Va. Code § 8-24-19. The statute states:

²⁰ See Brief on Appeal, p. 12 (“Further, while W.Va. Code § 8-24-18 requires only the Planning Commission to hold a public hearing, the public hearings held on February 23, 2005 and March 3, 2005 involved both the Planning Commission and the County Commission. A quorum of the Planning Commission was present at each hearing, satisfying the requirements of W.Va. Code § 8-24-18.”)

²¹ Jefferson County Commission Minutes, January 20, 2005, Pg 3; Jefferson County Planning & Zoning Commission Minutes, January 25, 2005, #15, Pg 3

²² Jefferson County Commission Minutes, January 27, 2005, Pg 5

“After a public hearing has been held, the commission may by resolution adopt the comprehensive plan and recommend the ordinance to the governing body of the municipality or to the county court [county commission].”

The Circuit Court found that the Planning Commission did not comply with this procedural step either. *February 26, 2008 Order* at p. 15.

The West Virginia Supreme Court of Appeals in *Lower Donnally Ass’n v. Charleston Mun. Planning Com’n*, 212 W.Va. 623, 575 S.E.2d 233 (2002), held that:

“In the process of adopting the comprehensive plan or a later amendment to it, the planning commission is required to publish notice of and hold a hearing. If the planning commission wishes to sanction the plan or an amendment to it after the hearing, the planning commission is required by West Virginia Code, § 8-24-19 (1969) to ‘adopt’ the plan or amendment by resolution and ‘recommend’ the enabling ordinance to the city council or county commission.”

Lower Donnally Ass’n v. Charleston Mun. Planning Com’n, 212 W.Va. at 627, 575 S.E.2d at 237 (2002).

Under the application of the *Lower Donnally* standard, the Planning Commission fails in its compliance to W. Va. Code § 8-24-20. The Planning Commission did not adopt the amendments, nor did it recommend the amendments.

The County Commission refers to the Planning Commission’s March 22, 2005 Minutes in support of its compliance with W.Va. Code § 8-24-19.²³

The statute requires that the Planning Commission, after holding a public hearing, may adopt the comprehensive plan and recommend the ordinance to the County Commission. In the present case, as previously mentioned, the Planning Commission not only failed to hold a public

²³ Jefferson County Planning & Zoning Commission Minutes, March 22, 2005, # 13, Pg 3 (Request by Corliss to determine whether the County Commission’s proposed Ordinance Amendments are consistent with the Plan. Corliss stated that Chapter 8A suggests that the proposed Ordinance amendments come back again to the Planning & Zoning Commission to see if the changes are consistent with the Plan. Kern stated that she would like the proposed amendments to go to a Public Hearing. Dailey stated he did not think the amendments needed to go to a Public Hearing as the Plan doesn’t state that. Raco stated that the amendments were written and approved by the Prosecuting Attorney’s Office.)

hearing, a detailed reading of the March 22, 2005 Planning Commission Minutes states that the Planning Commission dismissed the suggestion by one of its members that it hold a public hearing regarding the proposed amendments.²⁴

Because the Planning Commission failed to comply with W.Va. Code § 8-24-19, the amendments are void, as the Circuit Court correctly found.

D. The Circuit Court Properly Ruled that the Planning Commission Failed to Comply with W.Va. Code § 8-24-20

The County Commission erroneously alleges the Planning Commission complied with W.Va. Code § 8-24-20.²⁵ The Circuit Court found the Commission's argument to the contrary to be "without merit." *February 26, 2008 Order* at p. 15.

First, as previously mentioned, the Planning Commission did not publish a notice of or hold a hearing. Secondly, if the Planning Commission wished to sanction the amendments, the Planning Commission is required to adopt the amendments by "resolution." No County Commission or Planning Commission Minutes suggest that the Planning Commission adopted the amendments by resolution, nor has the County Commission provided a copy of the required resolution.

The County Commission attempts to argue that the Planning Commission's unanimous vote fulfills "certification" of the amendments as mandated in W.Va. Code § 8-24-20.²⁶

W.Va. Code § 8-24-20 states:

"Upon adoption of the comprehensive plan and recommendation of the

²⁴ Although Planning Commissioner Rosella Kern stated she would like the proposed amendments to be discussed at a public hearing, Planning Commission President, Arnie Dailey, stated that he did not think the amendments needed to go to a public hearing because the Comprehensive Plan does not state that. Raco stated that the amendments were written and approved by the Prosecuting Attorney's Office. See Jefferson County Planning & Zoning Commission Minutes, March 22, 2005, #13, Pg 3

²⁵ See Brief on Appeal, pp. 12-13.

²⁶ See Brief on Appeal, p. 13.

ordinance, the secretary shall certify a copy of the plan to the governing body of the city or to the county court [county commission].

At the first meeting of the governing body of the municipality or of the county court after adoption of the plan, the secretary or a member of the commission shall present the plan and ordinance to the governing body or to the county court.”

One must ask, how does the Planning Commission voting that an amendment the County Commission drafted is consistent with the Comprehensive Plan, qualify as drafting the amendment and the Planning Commission certification of a copy of the amendment to the County Commission? Obviously, these are two very different things, yet the Commission asserted they are the same.

The County Commission alleges that nowhere in W.Va. Code § 8-24-20 “is there a definition of ‘certify’ or ‘certification.’”²⁷ The County Commission therefore argues that because a definition of “certify” or “certification” is lacking in the statute, “one must make inference from the Planning Commission’s actions as whether the proper procedure was followed.”²⁸

The West Virginia Supreme Court has disagreed with the County Commission’s analysis:

“In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.”

Nield v. Reed, 218 W.Va. 292, 300, 624 S.E.2d 729, 737 (2005)

The West Virginia Supreme Court has, on several occasions, resorted to the use of a dictionary as the primary traditional source to ascertain the meaning of a word.²⁹

²⁷ See Brief on Appeal, p. 13.

²⁸ See Brief on Appeal, p. 13.

²⁹ See *Killen v. Logan County Com’n*, 170 W.Va. 602, 295 S.E.2d 689 (1982) (“To determine the meaning of ‘value,’ we have looked to the four traditional sources of judicial definitions of words used in statutes and constitutions, but not specifically defined in them. These are: (1) dictionary definitions; (2) pronouncements by courts; (3) reliable extra-judicial commentary; and (4) definitions set or inferable from debates and proceedings of the legislative bodies that drew the documents.”); *Copier Word*

Black's Law Dictionary defines "certify" as: "To authenticate or vouch for a thing in writing."³⁰

Black's Law also defines "certification" as:

"The formal assertion in writing of some fact. The act of certifying or state of being certified."³¹

The West Virginia Supreme Court has held that "certify" denotes *written* certification:

"'Certify' has been defined as 'to attest, or to attest authoritatively.' See, 6A Words and Phrases at 86 (1966). Black's Law Dictionary at 287 (Rev. 4th ed. 1968) defines 'certify' as 'to testify in writing; to make known or establish as a fact.' We believe that 'certify' to the county court simply indicates that the court should, by affidavit, or other attested *writing*, state that certain services as indicated on the attorney's statement were in fact performed." (Emphasis added)

State ex rel. Johnson v. Robinson, 162 W.Va. 579, 585, 251 S.E.2d 505, 509 (1979)

Based on these accepted definitions, the County Commission must receive from the Planning Commission, authentication or certification in writing of its adoption of the Ordinance amendments—ordinance amendments that the Planning Commission was supposed to have drafted.

The County Commission has not provided a certified written copy of the amendments because no certified copy exists. To be in compliance with W.Va. Code § 8-24-20, the Planning Commission must be able to show that it provided the County Commission with a certified copy

Processing Supply, Inc. v. Wesbanco Bank, Inc., 220 W.Va. 39, 640 S.E.2d 102 (2006) ("Based on the ordinary meaning of the word 'an,' as ascertained from the dictionary, we think the statute refers to possession of a single offensive weapon."); *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 624 S.E.2d 729 (2005) ("Black's Law Dictionary 1249 (7th ed. 1999) (defining a bona fide purchaser as ..");

³⁰ Black's Law Dictionary, Abridged Sixth Edition, 1991, Pg 156

³¹ Black's Law Dictionary, Abridged Sixth Edition, 1991, Pg 155

of the amendments, which it has failed to do.³²

Because the County Commission failed to receive the mandated certified copy of the Ordinance amendments from the Planning Commission, the amendments are void.

E. The Planning Commission Failed to Comply with W.Va. Code § 8-24-21

The County Commission erroneously alleges it followed the mandate of W. Va. Code § 8-24-21.

W. Va. Code § 8-24-21 states:

“After certification of the plan and ordinance to the governing body of the municipality or to the county court [county commission], the governing body of the municipality or the county court shall proceed to a consideration of the plan and ordinance and shall either adopt, reject or amend the same. If the ordinance adopting the comprehensive plan is published, the plan may be incorporated by reference in the ordinance and the full text of said plan not published.”

As stated in the statute, the County Commission shall proceed to a consideration of the plan and ordinance only after mandatory certification of the plan and ordinance to the County Commission by the Planning Commission was accomplished.

As previously explained, no such certification was undertaken by the Planning Commission, therefore the County Commission could not have proceeded to a consideration and adoption of the plan and ordinance. The County Commission is therefore incapable of complying with W.Va. Code § 8-24-21.

The Circuit Court found that the County Commission did hold a hearing as required by W. Va. Code §8-24-21, but held that the Court “cannot see how the County Commission was capable of adopting the proposed amendments when the Planning Commission did not follow the

³² (“It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.” Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W.Va. 445, 300 S.E.2d 86 (1982))” See *Evans v. Evans*, 219 W.Va. 736, 639 S.E.2d 828, 833 (2006)

previously mandated steps.” *February 26, 2008 Order* at p. 16.

Because the County Commission acted without first obtaining the required certified copy of the Ordinance amendments, it is in violation of W. Va. Code § 8-24-21 and therefore the Ordinance amendments are void.

F. The County Commission failed to meet its burden in its opposition to JCCEP’s Summary Judgment Motion.

The County Commission failed to meet the burden imposed by Rule 56 upon the nonmoving party in that it failed to counter the evidence presented by JCCEP in JCCEP’s Motion for Partial Summary Judgment.³³ Instead, the County Commission seemed to believe that it was JCCEP’s burden, when, in reality, the burden shifted to the County Commission once JCCEP filed its Motion for Partial Summary Judgment.

The County Commission therefore failed to produce the necessary burden of proof to overcome JCCEP’s Motion for Summary Judgment in that it offered less than a mere “scintilla” of evidence in its opposition.³⁴ Consequently, this Court should uphold the Circuit Court’s Order Granting Summary Judgment to JCCEP.

IV. CONCLUSION

The County Commission failed to mandate that the Planning Commission follow the

³³ *Stonewall Jackson Memorial Hosp. Co. v. American United Life Ins. Co.*, 206 W. Va. 458, 466 525 S.E.2d 649, 657 (1999) (“If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

³⁴ *Browning v. Halle*, 219 W. Va. 89, 632 S.E.2d 29, 35 (2005)

“[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence,’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” *Painter v. Peavy*, 192 W. Va. 189, 192-93, 451 S.E.2d 755, 758-59, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 214 (1986).

requirements of its own ordinance, in enacting the April 8, 2005 amendments, which would have required the Planning Commission to follow the procedural steps in W.Va. Code § 8-24-1, *et seq.*, in adopting the Ordinance amendments.

Even if the Planning Commission had failed to comply with only one of the mandatory duties of ordinance Section 12.2 and W.Va. Code § 8-24-1, *et seq.*, then the Circuit Court would have been correct when it declared the amendments void.

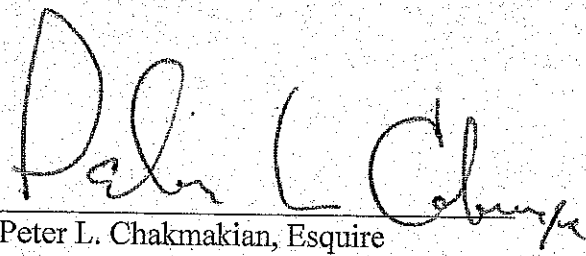
Instead, the County Commission and the Planning Commission have failed to comply with at least three separate statutes regarding the adoption of the Ordinance amendments, leaving the Circuit Court with no other alternative but to grant summary judgment as to this issue.

There was no evidence to lead a reasonable trier of fact to believe that the Commission followed the procedural and statutory steps outlined in Section 12.2 and followed W. Va. Code §8-24-18 through §8-24-23 when adopting the amendments. Since the evidence could not lead a reasonable trier of fact to conclude that the procedural steps outlined in §12.2 were followed, the Circuit Court properly granted summary judgment as to this issue.

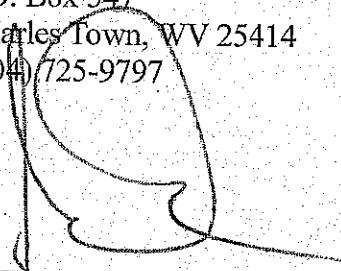
Accordingly, this Court should deny the Appeal and uphold the Order of the Circuit Court.

Respectfully submitted,

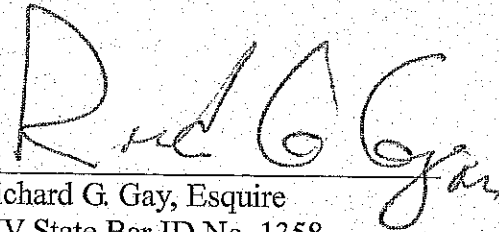
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEFFERSON COUNTY ZONING
BOARD OF APPEALS, A public body,
PAUL RACO, Zoning Administrator,
THOMAS TRUMBLE, Member,
EDWIN T. KELLY, II, Member
TIFFANY HINE, Chair,
CHRISTY HUDDLE, Member,
FRANCES MORGAN, Member,

Appellant / Respondent Below

v.

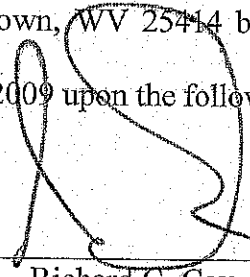
DOCKET NO. 34583

JEFFERSON COUNTY CITIZENS
FOR ECONOMIC PRESERVATION,

Appellee / Petitioner Below.

CERTIFICATE OF SERVICE

I, Richard G. Gay, Esquire and/or Peter L. Chakmakian, Esquire, and/or Nathan P. Cochran, Esquire, counsel for Respondent, Jefferson County Citizens for Economic Preservation, do hereby certify that an exact copy of the foregoing **RESPONSE BRIEF ON APPEAL** and **CERTIFICATE OF SERVICE** has been served upon James Casimiro III, Esquire, Asst. Prosecuting Attorney, P.O. Box 729, Charles Town, WV 25414 by United States, first-class, postage prepaid mail, this 6th day of January, 2009 upon the following:



Richard G. Gay, Esquire
Peter L. Chakmakian, Esquire
Nathan P. Cochran, Esquire